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the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Medical Central Online, Inc.

Serial No. 76138824

Brian M. Mattson of Patents+TMS, P.C. for Medical Central Online, Inc.

Samuel E. Sharper, Jr., Trademark Examining Attorney, Law Office 108 (David Shallant, Managing Attorney).<sup>1</sup>

Before Hohein, Bottorff and Rogers, Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Medical Central Online, Inc. has applied to register PATIENT NET as a mark for services identified as "providing information and updates of bed availability in nursing homes to hospitals, doctors, and administrative personnel to assist in placement of patients in nursing homes wherein the information may be accessible via a global computer

<sup>1</sup> Mark Rademacher, Trademark Examining Attorney, Law Office 101, examined the application and issued all office actions. Samuel Sharper briefed the appeal.

network," in International Class 42. In the application, applicant claims first use anywhere and first use of the mark in commerce as of January 1991; and registration is sought on the Principal Register under Section 2(f) of the Lanham Act, 15 U.S.C. §1052(f).<sup>2</sup>

Registration of the mark has been refused by the examining attorney, under Section 2(d) of the Lanham Act, 15 U.S.C. §1052(d), because of the prior registration of the mark PATIENTNET for the following goods:

Computer hardware and software for acquiring, interpreting, and distributing patient status information through local, wide area, and global computer communications networks, in International Class 9.

Patient status monitoring apparatus, namely, electronic devices for acquiring, interpreting, analyzing, storing, processing and distributing patient medical vital signs data; central monitoring apparatus for monitoring patient vital signs; physiologic monitors; individual patient vital signs monitors; and patient support devices, namely, intravenous pumps, ambulatory transmitters, and ventilators, in International Class 10.<sup>3</sup>

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<sup>2</sup> The examining attorney had also refused registration of applicant's mark under Section 2(e)(1) of the Lanham Act, 15 U.S.C. §1052(e)(1), after concluding that it is descriptive of applicant's services. While applicant initially argued against that refusal, it amended the application to proceed under Section 2(f) and has not made that refusal an issue on appeal.

<sup>3</sup> Registration No. 2440343 issued April 3, 2001, and lists October 25, 1999 as the date of first use and first use of the mark in commerce for both classes of goods.

The examining attorney refused registration on the theory that there is a likelihood of confusion among average purchasers or users of applicant's services and registrant's goods. When the refusal of registration was made final, applicant appealed. Applicant did not request an oral argument.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See In re E. I. du Pont de Nemours and Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion presented by this case, key considerations are the virtually identical nature of the marks and the question of whether the goods and services are related in such a manner that their marketing under the respective marks is likely to cause confusion of relevant purchasers or users. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 1103, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

In regard to the look, sound and meaning of the marks, we note first that the marks look the same, but for

applicant's presentation of PATIENT NET as two words while the registered mark is presented as a single compound word; neither mark is set forth in a particular typeface or font and neither mark includes a design element. Second, the marks clearly would be pronounced the same. Third, in regard to connotation, the examining attorney who examined the application acknowledged that applicant claims the marks have different connotations, but argues that applicant has failed to explain why the marks would be perceived differently.<sup>4</sup>

In essence, the examining attorney argues that the marks have the same connotation because he views applicant's goods and registrant's services as broadly related and he concludes that each mark will be imbued with the broadly stated connotation of "healthcare monitoring goods and services." Final Refusal, p. 2. In contrast, the applicant focuses on the specific differences in the respective identifications of goods and services and concludes that each mark will have a connotation as specific as the identification with which it is associated.

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<sup>4</sup> The examining attorney who briefed the appeal asserted that applicant essentially conceded similarity of the marks in sight, sound and meaning, but we discern no concession in the file as to similarity of meaning.

Notwithstanding this disagreement about whether the marks will be perceived as having similar broad connotations or different specific connotations, we agree with the examining attorney that the marks must be considered virtually identical for the purpose of assessing likelihood of confusion. Even if we assume applicant is correct in arguing that the marks will convey different specific meanings, because of their respective uses, the similarity in sight and the identical pronunciation of the marks would outweigh any possible difference in meaning.

In many cases involving virtually identical marks, the striking similarity of the marks is a factor that weighs heavily against an applicant. See, e.g., In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984). Nonetheless, because the terms "patient" and "net" are at least highly suggestive when used on or in conjunction with the involved goods and services, we place less importance on the virtually identical nature of the marks in our assessment of the likelihood of confusion.<sup>5</sup>

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<sup>5</sup> As noted, applicant is pursuing registration under Section 2(f). In addition, the examining attorney has put into the record numerous third-party registrations that include disclaimers of PATIENT or phrases including that term, for goods or services relating to health care, and numerous third-party registrations that include a disclaimer of NET for products or services related to or involving use of computer networks.

We now turn to consider the relationship of the registrant's goods and applicant's services. In doing so, we are mindful that it is well settled that goods or services need not be identical or competitive to support a finding of likelihood of confusion. However, the goods or services must at least be related in some way or the circumstances of their marketing be such that they would be encountered by the same persons, even if not contemporaneously, who would, because of the marks, mistakenly conclude that the goods or services are in some way associated with the same producer, or that there is an association between the producers. In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991); In re International Telephone & Telegraph Corp., 197 USPQ 910 (TTAB 1978).

Applicant seeks registration of its mark only for the service of running an Internet website. Moreover, the website is limited in scope to providing information on the availability of beds, or types of rooms, in nursing homes. Finally, it is a service available only to doctors and administrative personnel of hospitals, not to any individual or family in search of a nursing home.

Registrant's goods are very specialized electronic devices for providing physiological support to patients in hospitals and for monitoring the status of medical vital

signs of hospital patients, and central monitoring units for monitoring patients by collecting medical status information and analyzing it. Registrant also produces computer hardware and software for "acquiring, interpreting, and distributing" information on the status of patients. The hardware and software products can be used in or with local or wide area networks<sup>6</sup> and the Internet.

In an effort to show the relationship of registrant's goods and applicant's services, the examining attorney put into the record various Internet web pages that purportedly show that "[h]ealthcare software and services are often marketed together to consumers, many times under the same mark." Final Refusal, p. 3. We find this assertion too broad to be helpful to our analysis. Likewise, we find the evidence to which it refers is not probative of a relationship between registrant's goods and applicant's services.

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<sup>6</sup> We take judicial notice of the following dictionary definition: **local-area network** A computer network that spans a relatively small area. Most LANs are confined to a single building or group of buildings. However, one LAN can be connected to other LANs over any distance via telephone lines and radio waves. A system of LANs connected in this way is called a *wide-area network* (WAN). Random House Webster's Computer & Internet Dictionary 320 (3rd ed. 1999).

It would not surprise us at all to find some healthcare related software and some healthcare services to be marketed under the same mark, but that does not mean that any software utilized in the healthcare field would always be viewed as related to any healthcare service simply because they are marketed under the same or similar marks. Nor are the Internet web pages helpful to our analysis, because none of the hosts of these web pages appears to be marketing hardware and software such as registrant's<sup>7</sup> and none appears to offer any Internet-based service for doctors and other healthcare providers to find rooms or beds in nursing homes or long-term healthcare facilities.

We find that registrant's products are very specialized and clearly intended to be utilized by personnel in healthcare facilities that are directly involved in patient care. They do not appear to be related to billing, insurance coverage or other aspects of the modern interface between a patient and the healthcare

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<sup>7</sup> The products and services almost universally appear to be what are termed "practice management" products and services, and focus on billing, scheduling, filing of claims for reimbursement by insurance plans, and management of records necessary for such processes.

system.<sup>8</sup> The only relationship between applicant's service and registrant's products is that registrant's products can be used to facilitate access by health care personnel to patient medical status information via the Internet, and applicant's nursing home room locator service also utilizes the Internet.

To the extent that doctors or nurses directly involved in patient care, i.e., the relevant class of consumers or users of registrant's products, may also have occasion to utilize applicant's service to ascertain whether a bed in a nursing home may be available for a patient, there may be occasions for the same individual to utilize both registrant's products and applicant's service. Nonetheless, we find the products and service distinctly different, and we find the evidence of record to be devoid of support for the examining attorney's contention that such products and services would be viewed as likely to emanate from the same source. The third-party registrations and Internet web pages made of record show that there are many different computer or network-related

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<sup>8</sup> In the final refusal of registration, the examining attorney notes that he reads "patient status information" broadly and appears to consider that phrase to include the aspects of a patient's status other than medical status. We find it too broad a reading of the identification in the cited registration to consider patient status to include aspects of status other than medical status.

products and services available to healthcare professionals and facilities, but we disagree with the examining attorney's apparent conclusion that any two such products or services marketed under highly suggestive marks will necessarily be viewed as related.

The examining attorney bears the burden of making out a persuasive case for finding that confusion among consumers or users of products and services is not merely a theoretical possibility but is likely. In this case, the examining attorney has not carried the burden.

Decision: The refusal of registration is reversed.